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IN the SUPREME COURT of Judicature of the State of New-York, holden at the Capitol, in the City of Albany, of the term of August, 1820—

BEFORE

The Honourable

AMBROSE SPENCER, *Chief Justice*,
WILLIAM W. VAN NESS,
JOSEPH C. YATES,
JONAS PLATT, and
JOHN WOODWORTH, } *Justices.*

BLOODGOOD, *Clerk.*

(CONSTITUTION OF THE U. S.—JEOPARDY—POWER TO DISCHARGE A JURY.)

ROBERT M. GOODWIN'S CASE.

[Continued—Ante. P. 52.]

VAN WYCK, WELLS, GRIFFIN, and BLAKE, *Counsel for the Prosecution.*

EMMET *and* HOFFMAN, *Counsel for the Defendant.*

In a case of Felony, in the Court of General Sessions, in New-York, after a trial of five days, the Jury were kept together seventeen hours to deliberate on a verdict, and after eleven o'clock in the evening, of the last day of the term, returned into Court, and declared there was no probability of their agreeing on a verdict, and were discharged—it was held that such discharge was a discreet and legal exercise of the powers of that Court, and did not operate as an acquittal of the prisoner.

In cases, as well of felony as misdemeanor, where an absolute necessity exists for discharging a Jury, the Court, in its discretion, may discharge them, and the prisoner may be again brought to trial for the same offence.*

That no person shall "*be subject, for the same offence, to be twice put in jeopardy of life or limb,*" is a fundamental principle of the common law, and as such, is obligatory on all courts; and whether that clause, in the amendments to the constitution of the United States, was intended to bind the state courts, is, therefore, immaterial: but no man, in a legal sense, can be said to have been "put in jeopardy of life or limb," unless he has been *acquitted* or *convicted* by the verdict of a Jury.

On Monday, the 8th day of May, of the term of May last, the counsel for the prisoner moved for his discharge, on the ground, that, as he had been tried in the Sessions, and the Jury had been discharged by the Court, without his consent, before agreeing on a verdict, he could not be tried again.

The counsel argued that the cases of Denton and Olcott, (2 John. cases, 275 and 301.) were cases of misdemeanor, inapplicable to the case before the Court; but that they rather afforded an argument in favour of the prisoner. There is no case of felony, either in this country or England, where the Jury, for the same cause as is here alleged, has been discharged, without the consent of the prisoner, and he has been brought to trial again for the same offence. In cases of absolute necessity, it is true, Juries have been discharged, and the prisoner has been again brought to trial; but it will be found, by recurring to the cases, that such discharge has been the result of absolute necessity, or was intended for the advantage of the prisoner. The leading case of the two Kinlocks, (Fost Crown Law, p. 22 and 23.) referred to by his Honour, the present Chancellor, in his opinion in the case of Olcott, was decided on this principle: on the trial of the prisoners they moved to have a Juror withdrawn for the purpose of interposing a new plea. This having been granted, they were again brought to trial; and it became a serious question among the ten Judges of England, whether the prisoners could be tried again, and though the affirmative of the question was decided by nine of the Judges, one of them dissented. And in the case of Olcott, the Judge, in his opinion, cautiously confined himself to the case then before the Court.

In the case reported in the 2d of Leach's Crown Law, (p. 706.) where one of the Jurors fell down in a fit, and in that case, in the same authority, (p. 718.) where the prisoner became sick, and the Jurors were discharged, this was the result of inevitable necessity, and such discharge was in favour of life or liberty: but in this case no such necessity existed, nor was the discharge of the Jury in favour of the prisoner.

* See the case of Hausburst, 2d vol. of the City-Hall Recorder, p. 33, and authorities collected, ib. p. 35. *n.*

But the exercise of this power of discharging a Jury, in a case of felony, especially by an inferior Court, as the Sessions, is dangerous in the extreme, and ought never to be tolerated. It is unsafe to trust a power so delicate and important to this Court; it is circumscribed in its jurisdiction: it cannot grant a new trial (1. John. cases 279.) nor can a party in a case of felony remove a case from that Court, by *certiorari*, as he may do in a case of misdemeanor.

In the fifth article of the amendments to the Constitution of the United States, it is declared that no person "shall be subject for the same offence, to be twice put in jeopardy of life or limb," (1. R. L. p. 26.) The meaning of *limb*, in this place, is whatever was a felony at common law, and subjected the party, on conviction, to personal imprisonment. It may be said this section in the Constitution applies only to the Courts of the United States; but it was intended to secure the rights of every citizen; and in the sixth article of the Constitution it is declared to be the supreme law of the land. The meaning of the word *jeopardy*, is peril or danger, and in legal parlance never was intended to denote a trial. (1 Chitty's Crim. Plead. 620.)

The counsel strenuously contended that the rule laid down by Lord Coke (3d Inst.) was the common law, and the law of this country; and that the framers of our Constitution intended to give a legislative sanction to that ancient principle. It is recognised in 1 Hale's Summary of the Pleas of the Crown, 267. Carth. 466. Cases temp. Holt, 403. Hawk. B. 2. C. 41 and 4. Black. Com. p. 351.

The right of discharging a Jury in a criminal case was unknown to our forefathers: and all the cases which have been decided, in which this right has been recognised, are exceptions to the general rule adopted by Lord Coke, and innovations on this ancient doctrine. And, in answer to all those authorities establishing this right in the Court, in cases of necessity, it is sufficient to say that in this case no such necessity existed.

The word *limb* in the amendment of our Constitution, is derived from English statutes, and means any felony above the degree of Petit Larceny, whether with or without benefit of clergy. Before the Norman conquest, felonies of this description were punished with dismemberment. In the Saxon times, and down until the 9th. of Henry 1st. this punishment continued; and though since that time it has been abolished by subsequent statutes, yet the phrase *loss of limb*, has been continued in the English law books from the Saxon times down to our own, and was adopted by the framers of our Constitution, who thereby meant that the ancient principle of the common law, laid down by Lord Coke, should be the supreme law of the land, and binding on all our Courts of Justice. And by this phrase they meant to limit judicial discretion.

The counsel pointed out the several successive English statutes by which the Saxon punishments were abolished; and to show that *loss of life and limb* imported a felony, cited 1 Hale, P. C. p. 753. 3 Inst. from p. 93 to 101. in which those statutes are commented on. 1 Hale 342. 1 Inst. 390. a. b. 1 Hale, 461. Hawk. B. 1. C. 40. Sec. 2. 2 Hale P. C. p. 325, 326. 330. Hob. 294.

The counsel contended that the word *jeopardy*, in its legal import, means peril, hazard, or risk, to all which the defendant had been subjected; for, during the whole trial, he stood in as much *jeopardy* as if a sword had been suspended over his head by a thread.

If the framers of our Constitution intended to give a legislative exposition of this ancient doctrine of the common law, for which the counsel contended, it is wholly immaterial whether the article of the amendments relied on, was intended to apply to the Federal Courts only, or to these and the state Courts. If it is not of binding efficacy on the state courts, as a part of the Constitution, still, as a legislative exposition of this principle, it is of more efficacy than any English authority.

But this article is a declaration of personal rights for the protection of the liberty of all our citizens. Had not the framers of the Constitution a right, and were they not bound to adopt a rule for that purpose? Is there any violation of state sovereignty in this article more than in that, declaring that no *ex post facto* laws, or those impairing the obligation of contracts should be passed?

The unanimity among the Jurors in criminal cases, has been the law of England for six hundred years. The public prosecutor, in bringing a party to trial, pledges himself to make out his case to the satisfaction of twelve men. This is the principle and condition of such unanimity; and if he fails in performing this condition, he ought not to be allowed to plead necessity for discharging the Jury and putting the defendant again in jeopardy.

The counsel for the prosecution argued that the defendant ought not to be discharged, for that he had never been put in *jeopardy of life or limb*, within the legal acceptation of those terms. It is true the article in the amendment of the Constitution relied on, is a reiteration of the great principle of the common law; and the meaning of loss of *limb* is conceded to relate to those punishments which subjected the party, on conviction, to an infamous punishment; but the counsel differed from those on the opposite side, in their interpretation of the word *jeopardy*. When a party has been put on trial, and a Jury has once passed on his case, then, and then only, has he been put in jeopardy.

The counsel, in support of their argument, in which an extensive view was taken of the ancient doctrine on this subject, cited Kel. p. 25, 26. Comb. p. 401. 4th Black. Com. p. 360. 2 Hale's P. C. p. 297. Ray. p. 84. 1 Chitty's Criminal pleadings, (Eng. ed. p. 634. Phil. ed. 518.) 3d Camp. N. P. p. 207. 2d Hale's P. C. p. 296, 297. St. German Doct. & Stud. Dial 2. C. 52. and Foster's C. L. from p. 22 to 40.

That a jury may be discharged in a criminal case where the Court shall consider it a case of necessity, and the prisoner be put on trial a second time for the same offence, has been repeatedly decided, not only by this Court but by other Courts in this country. Case of Barrett & Ward, 1 John. Rep. p. 66. Case of Denton and Olcott, 2d John. cases, p. 275. 301. Case of Casborus 13 John. p. 351. 2d Gallison's Rep. p. 364. 4 Taun. 309. 2 Day. 504. and 9th of Mass. Rep. p. 494.

In the case of Olcott, Justice Kent expressly recognises this right in the Court, in a case of felony, wherever a necessity exists; and in the case from the Massachusetts Reports, the point is directly decided. This was a case of highway robbery: the Jurors could not agree, and one of them was withdrawn without the consent of the prisoner, and he was again tried and convicted.

That there was a necessity in the present case to discharge the Jury cannot be questioned; the term of the Court of Sessions, as established by law, would have expired in about an hour after the Jury was discharged; and such was the public excitement, at that time, that it would have been indiscreet, if not dangerous, to have sent the Jury out again.

Forcing a Jury to unanimity is a monstrous doctrine and ought never to be tolerated; for if it should ever be established as a law in this country that the Court has no right, in any case, to discharge the Jury, then, considering the right of a prisoner to a peremptory challenge, in most cases it would be in his power to get one on the Jury who would never agree to convict him; and the consequence might be that the others would be compelled, by hunger and fatigue, to render a verdict contrary to the clearest conviction of their own consciences.

After the arguments of the counsel, and on the 10th of May, on the opening of the Court, Chief Justice Spencer said that the Court deemed this a question of vital importance to the personal liberty of the citizens; and so important were the principles involved, that the Court had not, during this term, sufficient time for deliberating and forming an opinion. The Court, therefore, ordered the recognizance of the defendant to be continued over until the first Monday in August next, at the Capitol in the city of Albany, to receive the order of the Court.

On Thursday, the 10th day of August, in this present term, the defendant appeared in Court, and Chief Justice Spencer delivered the following opinion:

A motion has been made to discharge the defendant on the ground that it appears by the return to the *certiorari* that he has been once tried, and, therefore, cannot legally be tried again. He was indicted in the Sessions, in New-York, for manslaughter; the trial continued for five days, and the Jury having received the charge of the Court, retired to consider of their verdict, were kept together seventeen hours, and

declaring there was no probability of their agreeing in their verdict, were discharged, after eleven o'clock, on the last day in which the court could sit. It appears that the Jury had in the mean time, between their receiving the charge of the court and their discharge, come into court, and on being asked if they had agreed on their verdict, answered, through their foreman, that they had agreed, and that they found the prisoner guilty; but recommended him to mercy; but, on being polled, the third Juror called upon, declared his disagreement to the verdict. These are all the facts material to be noticed in considering the present motion.

The defendant's counsel rely principally on the fifth article of the amendments to the constitution of the United States, which contains this provision—"*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.*" It has been urged by the prisoner's counsel that this constitutional provision operates upon state courts *proprio vigore*. This has been denied on the other side. I do not consider it material whether this provision be considered as extending to the state tribunals or not: the principle is a sound and fundamental one of the common law, that no man shall be twice put in jeopardy of life or limb for the same offence. I am, however, inclined to the opinion, that the article in question does extend to all judicial tribunals in the United States, whether constituted by the congress of the United States, or the states individually. The provision is general in its nature, and unrestricted in its terms; and the sixth article of the constitution declares that that constitution should be a supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws in any state to the contrary notwithstanding. These general and comprehensive expressions extend the provisions of the constitution of the United States to every article which is not confined by the subject matter to the national government, and is equally applicable to the states. Be this as it may, the principle is undeniable that no person can be twice put in jeopardy of life or limb for the same offence.

The expression, *jeopardy of limb*, was used in reference to the nature of the offence, and not to designate the punishment for an offence; for no such punishment as loss of limb was inflicted by the laws of any of the states at the adoption of the constitution. Punishment by deprivation of the limbs of the offender, would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in England for a long period antecedently. We must understand the terms, *jeopardy of limb*, as referring to offences which in former ages were punishable by dismemberment, and as intending to comprize the crimes denominated, in the law, felonies. The crime of manslaughter is undoubtedly a felony; and therefore the prisoner is entitled to the protection afforded by the article of the constitution, whether we regard it as binding upon us by its own force, or as an acknowledged axiom of the common law.

The question then recurs—what is the meaning of the rule, that no person shall be subject for the same offence, to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: *That no man shall be twice tried for the same offence.* Should it be said that we can scarcely conceive that a principle so universally acknowledged and so interwoven in our institutions, should need an explicit and solemn recognition in the fundamental principles of the government of the United States, we need recur only to the history of that period, and to some other of the amendments, in proof of the assertion, that there existed such a jealousy, or extreme caution, on the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles, in relation to the rights of the citizens and the rules of the common law. The first article of the amendments prohibits Congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition government for a redress of grievances. The second secures the right of the people to bear arms; and, indeed, without going into them minutely, nearly all the amendments of that

instrument indicate either great caution in defining the powers of the national government, and the rights of the people, and the states, or they evince a jealousy and apprehension that their fundamental rights might be impugned, so as to leave no doubt that in the article under consideration, no new principle was intended to be introduced. The test by which to decide whether a person has been once tried, is perfectly familiar to every lawyer; it can only be by a plea of *autrefois acquit*, or a plea of *autrefois convict*. The plea of a former acquittal, Judge Blackstone says, (4 Com. 335.) is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence; and since, he says, it is allowed as a consequence, that where a man is once fairly found not guilty upon an indictment, or other prosecution, before any court, having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. The plea of a former conviction depends on the same principle, that no man ought twice to be brought in danger for the same crime. To render the plea of a former acquittal a bar, it must be a legal acquittal by judgment upon trial, for substantially the same offence, by verdict of a petit jury, (1 Chitty, Crim. Law, p. 372.) In the present case, it is not pretended that the prisoner has been acquitted, unless the discharge of the jury, without having agreed on their verdict, and without the prisoner's consent, shall amount in judgment of law to an acquittal. This brings us to the question, whether the Court of Sessions could discharge the jury under the circumstances of this case. If they could not, then I should be of the opinion, that although there could be no technical plea of *autrefois acquit*, the same matter might be moved in arrest of judgment; and if so, I can see no objection to the discussion of the question in its present shape, on a motion to discharge the prisoner.

In the case of the People vs. Olcott, (2 John, cases 301,) all the authorities then extant upon the power of the Court to discharge a jury in criminal cases, and the consequence of such discharge, were very ably and elaborately examined by Mr. Justice Kent, and it would be an unpardonable waste of time to enter upon a re-examination of them. In that case, the Jury, after having remained out from eight o'clock on Saturday evening, until near two o'clock the next day; and having, in the mean time, come into court two or three times for advice, declared that there was no prospect of their agreeing in a verdict, and were discharged without the consent of the prisoner: one of the questions was, whether the discharge of the jury entitled the defendant to be discharged, or, whether he could be re-tried. After examining and commenting on all the authorities the position of the learned judge was this: "If the court are satisfied that the jury have made long and unavailing efforts to agree, that they are so far exhausted as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference." He observed, "All the authorities admit that when any juror becomes mentally disabled by sickness or intoxication, it is proper to discharge the jury; and whether the mental disability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same." Again he observed, "Every question of this kind must rest with the court under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn, no other jury can in any event be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one." The learned judge inveighs, with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict is not founded on temperate discussion, but on strength of body. Although the case of the People vs. Olcott, was a case of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and although the opinion was confined to the case under consideration, a perusal of it will show that it embraces every possible case of a trial for crimes. The opinion was delivered in 1801, and

since then, this question has come under consideration in several cases. In the case of the King vs. Edwards, (4 Taunton, p. 309,) the indictment was for a felony; and while the prosecutor was giving his evidence, one of the jurors fell down in a fit; and he was pronounced by a physician, on oath, incapable of proceeding in his duty as a juryman that day. Whereupon the jury was discharged, and a new jury sworn, and the defendant was convicted. The point whether the prisoner could be tried after the discharge of the jury without the prisoner's consent, was argued before the judges of England, except Mansfield, chief justice, and Lawrence, justice—all the cases were cited; and the judges, without hearing the counsel for the crown, said that it had been decided in so many cases, it was now the settled law of the country, and gave judgment against the prisoner. The same course was adopted upon nearly the same state of facts, in Ann Scullent's case (Leach C. L. p. 700,) and in the case of the King vs. Stevenson, (Leach, 618.)—The prisoner fell down in a fit during the trial, and the jury was discharged, and upon his recovery, he was tried and convicted by another jury. In the case of the U. S. vs. Coolidge, (2d Gallison, p. 364,) a witness refusing to be sworn, the trial was suspended during the imprisonment of the witness for the contempt; and Mr. Justice Story held, that the discretion to discharge a jury existed in all cases; but that it was to be exercised only in very extraordinary and striking circumstances. And in the case of the Commonwealth vs. Bowden, (9 Mass. Rep. p. 494,) upon an indictment for Highway Robbery, the jury, after a full hearing of the case, being confined together during part of the day and a whole night, returned into court and informed the judge they had not agreed on a verdict, and it was not probable they ever could agree; whereupon one of the jurors was withdrawn from the pannel without the defendant's consent, and the jury was discharged; and during the same term, another jury was empannelled for his trial and he was found guilty. On a motion in arrest of judgment, the court refused the motion, saying, that the ancient strictness of the law upon this subject, had very much abated in the English Courts; that it would neither be consistent with the genius of our government, or laws, to use compulsory means to effect an agreement among jurors: that the practice of withdrawing a juror where there existed no prospect of a verdict had frequently been adopted in criminal trials in that court.

Upon a full consideration I am of opinion, that although the power of discharging the jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity; and that it may be exercised without operating as an acquittal of the defendant: that it extends as well to felonies as misdemeanors; and that it exists, and may discreetly be exercised, in cases when the jury, from the length of time they have been considering a case, and their inability to agree, may be fairly presumed as never likely to agree, unless compelled so to do, from the pressing calls of famine or bodily exhaustion. In the present case, considering the great length of time the jury had been out, and that the period for which the court could legally sit as nearly terminated, and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal.

Much stress has been placed on the fact that the defendant was in jeopardy, during the time the jury were deliberating. It is true that his situation was critical; and there was danger as regards him, that the jury might agree on a verdict of guilty; but, in a legal sense, he was not in jeopardy, so that it would exonerate him from another trial. He has not been tried for the offence imputed to him.—To render the trial complete and perfect, there should have been a verdict either for or against him. A literal observance of the constitutional provision would extend to embrace those cases, where, by the visitation of God, one of the jurors should either die, or become utterly unable to proceed in the trial. It would extend also to a case where the defendant should be seized with a fit, and become incapable of attending to his defence; and it would extend to a case where the jury was necessarily discharged in consequence of the termination of the powers of the court. In a legal sense, therefore, a defendant is not once put in jeopardy until the verdict of the jury is rendered against him. If for or against

him, he can never be drawn in question again for the same offence. And I entirely concur in reprobating the proceeding of withdrawing a juror and attempting to subject a person to a second trial because the public prosecutor was not prepared with his proofs. In the case of the People vs. Barrett and Ward (2 Caines, 304) this court considered it equivalent to an acquittal.

The only remaining inquiry is, whether the power of discharging the jury in this case, could be exercised by the sessions.

The Court of General Sessions for the city of New-York, are clothed with powers not entrusted to the General Sessions of any other county. It has the power to try for all crimes, (cases of life only excepted,) in as full and complete a manner as any court of Oyer and Terminer and Gaol delivery, for the said city and county, can hear, determine, or adjudge the same, (2 Rev. Laws P. 503.) It is not necessary now to decide whether the sessions in New-York, since the statute, can grant a new trial on the merits; but having as full and perfect a jurisdiction as the Oyer and Terminer and Gaol delivery excepting in cases of life, over all other crimes, no doubt can be entertained, that they possess all the incidents appertaining to the power of trying for these offences; and the right to discharge the jury, under the facts and circumstances of this case, was an incident to the trial. And, upon the whole I am of opinion, that whenever in cases of felony, a jury has deliberated so long upon a prisoner's case, as to preclude a reasonable expectation that they will agree in a verdict, without being compelled to do so from famine or exhaustion, that it becomes a case of necessity, and that they may be discharged, and the prisoner may be again tried. In the present case, we consider the discharge of the jury as a discreet exercise of the powers of that court, either on the ground that the jury had been kept together so long as to preclude all hope of their agreeing, unless compelled by famine or exhaustion, or on the ground that the powers of the court were to terminate within a few minutes, and that it was morally certain the jury could not agree within that period; and this produced an absolute necessity for discharging them.

In this opinion my brethren entirely concur; and the consequence is, that Goodwin must be tried at the next sittings; and his recognizance, and that of his sureties, will be respited until the next January term.—

Rule accordingly.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, on *Monday*, the 5th day of *August*, in the year of our Lord one thousand eight hundred and twenty.

PRESENT.

The Honourable
CADWALLADER D. COLDEN, *Mayor*,
SAMUEL TOOKER, and THOMAS S. TOWNSEND, } *Aldermen*.
P. C. VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk*.

(DISCHARGE OF A JURY—MATERIALITY OF TIME.)

CHARLES JOHNSON and JOHN B. GONZALES' case, *ind.* with JOHN BATTIS.

VAN WYCK, *Counsel for the prosecution*.

RODMAN, *Counsel for the prisoners*.

Where an indictment for a felony alleged, the offence to have been committed *on a day subsequent to that on which the indictment was found*, it was held that a juror might be withdrawn, and the jury discharged without consent, and the prisoner be brought to trial, for the same offence, on another indictment.

The time stated in an indictment is not material, nor traversable: but if an impossible day be laid, it will be a fatal defect.

On the 5th of April last, the prisoners were indicted for a petit larceny, which the indictment alleged to have been committed *on the 20th day of May*, 1820.

On the 7th of April then instant, they were brought to trial; and after the jurors were sworn, it was discovered by the public prosecutor, that the indictment charged the offence to have been committed on a day not then arrived; and, before any witness was sworn, he moved the court that a juror might be withdrawn. The court consented. One of the jurors, by the direction of the court, left the jury box; and the names of the jurors being called, eleven only answered. An entry was then made

by order of the court, that the jury be discharged, which was done accordingly, without the consent of the prisoners or their counsel.

On the 11th of April, in the same term, there was presented against the prisoners for the same offence, another indictment, on which they were arraigned and pleaded not guilty; and during the same term, Johnson and Gonzales were tried and convicted.

This latter plea was received, and the trial had, under an agreement between the district attorney and the opposite counsel, that the prisoners, if convicted, should be entitled, on a motion in arrest of judgment, to all the advantage they could have had by plea or otherwise, of the facts relative to their having been put on trial on a former indictment, and the jury having been discharged, without consent, in manner aforesaid.

The counsel for the prisoners moved, in arrest of judgment, on the ground that the jury having been sworn on the former trial, and discharged without consent, the prisoners had not been legally tried and convicted on the second indictment. The counsel, in support of his argument, cited 1 Inst. 227. b. 9. Coke's Rep. p. 13. 2 Hale's P. C. p. 296. 2 Hawk. P. C. chap. 42. sect. 1.

Van Wyck contra.

In the term of May following, the Mayor delivered the following opinion prefaced, in effect, by the preceding facts.

The question in this case is, whether the former indictment and the proceedings thereupon had, would be a bar to the second trial for the same cause.

It is perfectly well established that although the day laid in an indictment for larceny is not material, and be not traversable, yet if no day be mentioned, or if the offence, as in this case, be charged to have been committed on an impossible day, the indictment is altogether bad. (1 Chitty's Crim. Law, p. 225. 1 Term Rep. p. 316. 5 East. 244.)

The cases which have been cited by the counsel for the prisoners, to show that after a jury has been sworn, they cannot be discharged without rendering a verdict, afford, certainly, very ancient and very high authority. But these cases have all been frequently overruled, not only in the English courts but in our own courts; and it is now settled that it would be inconsistent with the administration of justice, as well in respect to persons accused as to the public, that it should be received as a rule, admitting of no exceptions, that in every case where a jury is sworn, they must render a verdict, which, under all circumstances, must be abided by.

I have frequently had occasion since I have had a seat on this bench, to express my opinion, that this court was bound by the decisions of superior tribunals, and that it is our duty to receive as law what they had declared to be so. Should any inferior tribunal in the United States feel itself at liberty to disregard its superiors, and to indulge its own speculations, our chief business would be to afford grounds for endless and useless appeals. Whenever, therefore, I find a point of law decided in a superior court of our own, I consider it my duty to submit to their judgment; and as I believe the question now under consideration has been fully decided by the supreme court, as indeed has been admitted by the counsel for the prisoners, I shall forbear to follow him in an examination of the authorities, upon a misconception or misconstruction of which he supposes the decisions cited from our own reports are founded.

In the case of the People vs. Denton, who was indicted for a misdemeanor, and where the jury were discharged without the consent of the defendant, because they could not agree, the supreme court decided that there might be a new trial.—(2 John. cases 276.)

The case of the People against Olcott (2 John. cases 301) was also a case of misdemeanor, in which, when it was found the jury could not agree, the oyer and terminer ordered a juror to be withdrawn; and the supreme court refused the application to discharge the defendant, on the ground that he had been put on his trial.

In the case of the People vs. Barret and Ward, (2d Caines' Rep. 100,) which was several times before the supreme court, when first submitted to them, presented merely the abstract question, whether in a case of misdemeanor, where the defendant had been put upon his trial, and a juror had, upon the application of the district attorney, been withdrawn, by order of

the court, a conviction of the defendants on the same indictment by another Jury, was regular. The court decided that the withdrawing the juror was not in itself cause for arresting the judgment, on the subsequent trial.

But when the same case was afterwards presented to the court, with a particular statement of the circumstances which induced the court below to order the juror to be withdrawn, the Supreme Court recognized and confirmed their former decision, but were of opinion that the court below ought not to proceed to judgment on the conviction, but should discharge the defendants, because it appeared from the facts then before them, that the juror had been withdrawn on no other ground, than because the public prosecutor found himself unable to proceed for want of sufficient testimony to convict; and where the inability was the consequence of his not taking the necessary measures to obtain it. (2 Caines' Rep. 304.)

Notwithstanding the defendants, after conviction, were thus discharged from this first indictment, they were again indicted for the same offence. Upon their arraignments they pleaded *auterfois acquit* to this second indictment. And the question whether this was a good plea, was submitted to the Supreme Court, in a case made.

The plea of *auterfois acquit* referred to the first indictment, and the proceedings upon it. The facts alleged in both indictments were the same, except that there was a difference with respect to the date of an endorsement of a note; and in respect to the description given to the property which was the subject of the misdemeanor. These, it was decided, were immaterial variations; but the counsel for the prosecution insisted that the first indictment was bad, because it omitted to connect, in proper form, a venue with a material allegation.

The Supreme Court decided that this objection was well taken, and that the first indictment was so defective, that a judgment against the defendant could not have been rendered upon it. That even an acquittal on that indictment, would not have sustained the plea of *auterfois acquit*, because the defendants, on that defective indictment, were never put in jeopardy.

Some of the Judges seem to think this artificial reasoning, but the majority, by whose decision we must abide, determined it to be law.

If it be so, then the rule, that a person can be but once put on his trial for the same cause, vanishes; or at least must be received, subject to certain exceptions.

It may be said that all these cases apply to misdemeanors, and that no exceptions have been, or are to be, admitted to the general rule, first stated, in cases of felony. I do not perceive any reasonable foundation for this distinction. It may be observed that in most of the instances in which the English courts have admitted exceptions to the general rule, have been in cases of felony, and many of them cases of life and death. And, in the case of Olcott, it is obvious that Chief Justice Kent did not consider the reasoning on which he founded his judgment, in that case, as applying to misdemeanors only.

But the case of the People *vs.* Casborus, (13 John. Rep. p. 351) was a case of felony. The prisoner was indicted for a larceny, and thereupon convicted in the Rensselaer Court of Sessions. That court arrested the judgment. A new indictment, precisely similar to the first, was preferred against him; to which last indictment, he pleaded *auterfois acquit*. To this plea the district attorney demurred, and the case was brought before the Judges of the Supreme Court, to decide whether the trial, on the first indictment, in which judgment had been arrested, was a bar to the second prosecution; and it was unanimously decided by the court, that it was not. Judge Spencer, in delivering the opinion of the court, refers to the case of *Burret* and *Ward*, as affording the rule that ought to govern as well in cases of felony as those of misdemeanor.

But it has been decided in this court, in the time of the late Mayor, in a case of Grand Larceny, that, where the Jury were discharged because they could not agree, the prisoner might afterwards be convicted on the same indictment. (Hauxhurst's case, 2d vol. City-Hall Recorder, p. 33.) And I think this court cannot now set up a different doctrine without contemning a course of decisions to which it is our duty to bow with respect.

If these authorities and considerations

will warrant the conclusion, that where a person has been subjected to all the formalities of one trial, he may again be tried and convicted, it must follow, *a fortiori*, that he may be tried again, to where, in the first instance, no further proceedings were had than to swear the jury. It seems to be settled by the case of Casborus, (13th John Rep. p. 351. See also 2 Hawk. c. 35. sect. 8, cited by chief justice Kent, in the case of Barret and Ward, 1 John. Rep. 76. Vaux's case, 4 Coke's Rep. 44.) that if the trial had proceeded, and the jury had pronounced a verdict, on this evidently and confessedly bad indictment, such verdict could not have been pleaded in bar to a second indictment. It appears absurd to say, that these incipient proceedings shall be a bar to a conviction, when it is admitted that the prisoners could not have availed themselves of any decision the jury might have rendered.

I am of opinion, that the court did right to direct a juror to be withdrawn in this case, when they perceived that the indictment was bad, and that it would have been a farce for them to have proceeded with the trial, when they must have known that the proceedings, either in respect to the prisoners or the public, must have been a mere nullity.

But though, in my mind, it cannot be questioned, that the court has the discretionary power to order a juror to be withdrawn, yet it is conceded that it is a power that should be exercised with the utmost caution; and I fully concur with the sentiments expressed by the court in the case of Barret and Ward, (2 Caines' Rep. p. 309) that a defendant ought, in no case, to be put on his trial a second time, where a juror has been discharged, on no other ground than because the public prosecutor found himself unable to proceed for want of sufficient testimony to convict, and where the inability was the consequence of his not taking the necessary means to obtain it. To dismiss a jury merely because there be not sufficient testimony against the accused, would be in the highest degree unjust and oppressive.

The judgment of the court is, that the prisoners, for the felony whereof they have been convicted, be imprisoned in the penitentiary of the city and county of New-York fifteen months.

PETIT LARCENY—AUTERFOIS ACQUIT.

JOHN H. SMITH'S CASE.

MAXWELL, *Counsel for the prosecution.*
PHOENIX, *Counsel for the prisoner.*

Stealing the goods of E. W. is not the same offence as stealing the same goods belonging to some person or persons to the jurors unknown.

In the term of January, 1818, on the 8th of the same month, the prisoner was brought to trial on an indictment for stealing, on the 27th of December then last, a coffin-plate, of the value of $1, the property of some person or persons to the jurors unknown.

It appeared from the testimony of Augustus B. Webb, that in the morning of the 26th of December, he was in the vault of the late Orange Webb, at the brick churchyard, at the corner of the Park and Beekman-street, and found the plate on the coffin, and the next day found it off. It was further proved, that the plate was offered for sale by the prisoner.

It further appeared, that Orange Webb died in November, 1817, and that Eliza Webb, his widow, was the administratrix of his estate; and, before the indictment was found, obtained letters of administration in the Surrogate's office.

The counsel for the prisoner objected to the further prosecution of this case, on the ground that as the property was vested in the administratrix when stolen, and as this was known, or might have been known, to the Grand Jury, when the indictment was found, it was their duty to have alleged the goods as her property.

Maxwell insisted, that if the personal representative could not have been well ascertained at the time the inquisition was found, the property might well be laid as that of some person or persons unknown; and to this point he cited 1 Starkie's Crim. Plead. p. 189.

Radcliff, then Mayor, charged the Jury that as the property, at the time the felony was committed, was vested in Eliza Webb, the administratrix, and as this might have been ascertained by application at the Surrogate's office, where letters of administration were obtained, that the ownership ought to have been alleged in her. On this ground the Jury acquitted the prisoner.

On the 15th day of January, 1818, the

prisoner was indicted for stealing a coffin-plate, the property of Eliza Webb.

To this indictment the prisoner, by his counsel, pleaded that which, in legal parlance, is termed a plea of *auterfois acquit*, that is, that he had been indicted and acquitted of the same offence of which he now is indicted.

Maxwell interposed a replication to this plea, taking issue on the material fact therein stated, and concluding to the country.

On Tuesday, the 3d of February following, this collateral issue was brought to trial before a Jury.

As the affirmative was held on the part of the prisoner, his counsel opened the case by reading the indictment on which he had been formerly acquitted, and the record of his acquittal.

The counsel then offered to prove that the prisoner was the same person mentioned in the record, and that the goods were the same: but these facts were admitted on the part of the prosecution.

It was then insisted before the Jury, by the counsel for the prisoner, that the ownership of property is merely descriptive; that the substantive allegation in the indictment is, that he stole a coffin-plate: and that it was immaterial whether the description of the property is the same in the first and second indictment or not; and, for aught that appears on the record, he was acquitted on the merits. The principle upon which the case of the prisoner depends, is, that no man shall be put in jeopardy twice for the same offence; and if this prosecution is sustained, and he is convicted, it will be subversive of that principle.

Maxwell contra, cited 1 Leach, 448.

Radcliff, Mayor, charged the Jury, that as it had been admitted that the prisoner was the same person named in the record of acquittal, and that the property laid in the first and second indictments was the same, that the principal question for determination was, whether the offence now charged against him was the same of which he had been acquitted.

The allegation of property in an indictment is material; and whenever the ownership of property is known, or might be ascertained, it ought to be truly laid in the indictment. But mistakes frequently occur before the Grand Jury; and, on the finding of the first indictment, they might have thought, from the peculiar nature of this property, that it was unnecessary to state this with greater particularity. The prisoner was acquitted, because the property was alleged to belong to a person or persons to the Jury unknown, when it was, or might have been known, that it belonged to the administratrix.

In the opinion of the court, the prisoner, on this occasion, has not shown enough to entitle him to a verdict. He should have alleged in pleading, or it should have appeared in proof, that he had been acquitted on a full trial on the merits: and, as he has not, he ought not to be allowed any advantage on this technical objection.

The Jury rendered a verdict, that the felony of which the prisoner is now charged is not the same of which he was formerly acquitted.

On Tuesday the 10th of March following, Phœnix moved the court for a new trial on this collateral issue, on the ground that the Jury had erred in their verdict; and he cited 1 Starkie, 175. Plowd. 85. Dyer. 97 and 285, and 2 Hale, 181, to show, that though a party is acquitted on the same ground, that the prisoner in this case was, he is entitled to his plea of *auterfois acquit*.

Riker, the Recorder, who was then on the bench, declined giving an opinion.

On Tuesday the 4th of August following, before the present Mayor, the motion was again renewed; and it was argued by the counsel for the prisoner, that the verdict ought not to stand, because the offence in the second indictment was, in law and fact, the same as in the first.

Van Wyck contra, cited 1 Chitty's Crim. Plead. p. 213. 3 Camp. N. P. p. 266. 2 Hawk. P. C. c. 25, sec. 71. 2 East. P. C. p. 651 and 781. 3 Chitty's Crim. Plead. 948, 949, and 958.

The court took time to consider; but, by reason of some accident, rendering an opinion unnecessary, none was delivered.

SUMMARY FOR AUGUST TERM.

BURGLARY.

John Connelly, for this offence in breaking and entering the dwelling house of Thomas H. Kennedy, on the night of the 25th of July, and stealing silver coin, amounting to twelve dollars; was tried

and convicted, and sentenced to the state prison for life.

FORGERY AND COUNTERFEITING.

George Lynch, a black man, for forging a check on the Branch Bank for ninety-six dollars, pleaded guilty, and was sentenced to the state prison for seven years.

Patrick Kelly was indicted separately for passing a counterfeit two dollar bill on the Phœnix Bank to Edward Lambert, and with *James Long* and *Henry M'Caddon* for passing a counterfeit bill of five dollars on the same bank, to John Sloan. The prisoners, during the month of July, went separately, and sometimes together, into stores, and passed off counterfeit money, under strong circumstances of suspicion. Kelly and Long were tried and convicted, and Kelly was sentenced ten years, and Long five to the state prison.

Barney Rankin, for uttering a three dollar counterfeit note on the Mechanics' Bank to Jacob Weaver, on the 22d July, was tried, convicted, and sentenced to the state prison for four years. The prisoner went to the store of Nathaniel Webb, and tried to pass the bill. He was told it was bad; but went immediately to Jacob Weaver's, and made the like attempt, where he was followed by Webb and apprehended.

GRAND LARCENY.

Robert Evans, alias *Stewart*, a young man, but an old offender, was indicted, tried, convicted, and sentenced for this offence, five years. He hired of John Fine a mare, under the pretence of going to the Bellevue; but instead of this went to New-Jersey, and was taken near New-Brunswick.

Peter Miller, *Alexander Archer*, and *John Dunn*, boys, were indicted, tried, convicted, and the two first sentenced to state prison, four years each, and the other three. They went into the house of Robert Young, on the 26th of July, and stole his wearing apparel, valued at thirty-seven dollars.

Peter Holden, indicted with *Cook*, *Hager*, and *Smith*, (see ante p. 89,) was tried and convicted on the same testimony as in the former case, for stealing a large quantity of gold, belonging to Justus Spurtzell. After conviction the counsel moved in arrest of judgment, and it was suspended.

Margaret Evans, for stealing the goods of William Cox, valued at 60 dollars, was indicted, tried, and convicted of this offence, and sentenced to the state prison for three years.

William Jones, a black man, on the night of the 4th of August, inst. stole the pocket book of Josiah Sherman, containing six hundred and forty dollars in bank bills. The prisoner confessed the fact fully; and after trial and conviction was sentenced to the state prison for seven years.

James Welsh, for stealing two coats valued at thirty-five dollars, the property of Foxhall and Parker, was convicted on confession, and sentenced to the state prison three years.

PETIT LARCENY.

William Ridgeway, *Andrew Frame*, *James Farrington*, *Samuel Hopkins*, *John Read*, *John Penny*, *Martin Cure*, *Simon Applegate*, *Francis M'Gonagle*, *George Gable*, *John M'Kein*, *Alexander Smith*, *Jane Montgomery*, *Mary Ann Jackson*, *Sarah D. Christian*, and *Margaret Evans*, were severally convicted of this offence, and the four first named were sentenced to the penitentiary, three years each, the two next for two years each, the two following for eighteen months each; Gable for one year, and the remainder for shorter periods.